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IN THE

Supreme Court of the United States

October Term, 1964

No. 252

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Petitioner,

against

A.A.P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U.M. & M. TV CORP., W.P.I.X., INC., PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, INC., KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee of FLEISCHER STUDIOS, INCORPORATED, a Florida corporation,

Respondents.

BRIEF FOR RESPONDENTS PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION AND FLAMINGO FILMS, INC., IN OPPOSITION

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Respondents.

BRIEF FOR RESPONDENTS PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION AND FLAMINGO FILMS, INC., IN OPPOSITION

The Opinions Below

The petition for certiorari (p. 2) cites the New York Supreme Court's decision in the related actions of *Fleischer* v. *W. P. I. X. Inc. and Fleischer* v. *N. T. A. Pictures, Inc.*, 30 Misc. 2d 17, but it omits all reference to the appellate court decisions which rendered that judgment final. Those appellate court decisions are reported at 14 App. Div. 2d 846 (1961), *appeals dismissed*, 11 N. Y. 2d 876, *appeals*

dismissed, "for want of a federal question", 371 U. S. 16 (1962).

The judgments therein do indeed, constitute *res judicata* with respect to the first cause of action, which the District Court dismissed on respondent's motion for summary judgment, and also collateral estoppel in the appeal from Judge Palmieri's order dismissing the second cause of action (Opinion of Court of Appeals, App. A, Pet., p. 50). However, as will be shown, there were many other, independently sufficient grounds for the affirmance of the judgment and order below.

In another pertinent opinion herein, reported in 163 F. Supp. 548 (S. D. N. Y. 1958), *appeal dismissed*, 264 F. 2d 515 (1959); *cert. denied, sub nom. Fleischer* v. *Benjamin*, 359 U. S. 1002 (1959), District Judge Herlands construed the first cause of action precisely as construed in the opinion granting summary judgment (222 F. Supp. at 41 *et seq.*), and also found that the petitioner was "unreliable and incredible as a witness so far as concerns his cross-motion," made to disqualify respondent Paramount's attorneys (163 F. Supp. at 569). On appeal from this order, the United States Court of Appeals for the Second Circuit expressly "noted its concurrence" with the decision, as well as another District Judge's decision strongly condemning other false charges made by petitioner (264 F. 2d at 518). It held that petitioner's and his counsel's "strictures are unjustified and unworthy" (at 518), and it characterized their entire proceeding as "dreary and acrimonious" (at 516).

This Court denied certiorari (359 U. S. 1002). It has also denied other petitions for certiorari in matters directly stemming from the opinion of the District Court which dismissed the second cause of action herein. *Garfield* v. *Palmieri*, 368 U. S. 827; 369 U. S. 871.

The Questions Presented

I. Was the second ("antitrust") cause of action legally insufficient and, therefore, properly dismissed, in view of the conjunction of each of the following facts?

a. The alleged violations of the antitrust laws were directed, not against plaintiff-petitioner personally, but against a corporation in which he was merely a stockholder; those violations were predicated on a contract made with the corporation, which expressly excluded rights in any other persons, and petitioner's connection with said contract was limited to his consent thereto as a stockholder and other incidental matters.

b. The Florida statutes applicable to corporations which, like plaintiff's said corporation, did not own any real estate, provide—and have been so construed by all of the courts—that the claims of such corporations vest in its directors as trustees, or in a receiver if appointed, for a period of three years after dissolution and then abate; whereas the instant action was not begun until eleven years after the corporation's dissolution.

c. The alleged antitrust violations stem from the provisions of an agreement made on May 24, 1941, and any damages allegedly sustained thereafter were merely consequential thereto, but no action was commenced until October 14, 1957.

d. The only so-called "antitrust violations" actually alleged in the complaint were provisions in said contract that the motion picture distributor could sell the cartoons produced by plaintiff's corporation "in groups with other motion pictures"; the contract does not permit, nor does the complaint allege, any conditioning of such sale upon the sale of any other pictures.

e. Plaintiff's corporation (which was not an exhibitor) sustained no damage as a result of any alleged antitrust

violation and, furthermore, any such violation was not directly connected with the purchase which petitioner seeks, sixteen years later, to annul.

f. The final judgment of the New York courts against this petitioner, in favor of one of the respondents and another defendant in substantial privity with the respondent distributor, in an action involving the same contractual provisions and subject-matter as the instant one, determined questions "a" and "b" hereinabove against the petitioner.

g. The circumstances and the "time sequence" of the interposition of this cause of action, by an amended complaint served in order to buttress a motion to disqualify respondent's attorneys, indicated, as a District Judge found, bad faith on petitioner's part.

II. Did plaintiff's first cause of action present any triable issue, in view of the conjunction of the following facts?

a. A final New York court judgment had been rendered against this plaintiff in favor of two defendants—one identical with a respondent herein, and the other substantially identical with another respondent and in privity with respondent motion picture distributor—in an action based upon the identical provisions of the identical contract, asserting the identical theories of action, seeking the identical relief, and involving the identical defenses, everyone of which was upheld.

b. Petitioner's theory of action was that the respondent motion picture distributor did not have the right to sell certain "new cartoons", released under the May 1941 agreement, for use in television; however, that agreement expressly and repeatedly vested full title and right of sale for all purposes in said distributor, including their use and sale for "television."

c. The contract in suit was between the distributor and petitioner's corporation, not petitioner, and it expressly provided that only said corporations, and no third persons, should have any rights or benefits thereunder.

d. The Florida corporation dissolution statutes, above referred to, were applicable.

Several of the petitioner's purported "questions presented"—as well as several of the "constitutional provisions and statutes" purportedly involved (Petition, pp. 3-12)—are, as hereinafter shown, actually not involved at all, and many of the "facts" recited are wholly outside the record and inaccurate. Far from being novel, every single question has been decided against the petitioner as matter of elementary law. These adjudications have been made many times, by many courts, in the course of what the courts have described as petitioner's "interminable litigation". *Fleischer* v. *W.P.I.X., Inc. and Fleischer* v. *N.T.A. Pictures, Inc.*, 30 Misc. 2d 17, *supra*, at 26; see also the Court of Appeals' reference to petitioner's "seemingly endless series of diffuse complaints"—Ex. A, Pet., p. 49.

Statement of the Case

At the time of the commencement of this action the complaint contained only the first (termed by petitioner "the accounting") cause of action. Summary judgment was granted dismissing it on each of the four grounds indicated by subdivisions a, b, c and d in Question II above.

This cause of action—as well as prior proceedings relating thereto—is analyzed in the opinion of the District Court herein (222 F. Supp. 40, 41-44). Its gravamen is that the agreement of May 24, 1941 between Fleischer Studios, Incorporated and respondent Paramount did not

give Paramount the right to sell the "new cartoons", released under that agreement, for television (*id.* at 42; answered in Point II, subd. b, *infra*).

The background of the May 1941 agreement, to paraphrase the New York Supreme Court's opinion (30 Misc. 2d at 19-20), is as follows:

> "In 1941 Fleischer Studios was heavily indebted to Paramount and was in financial difficulty. This led to the May 24, 1941 agreement * * * which is the heart of these lawsuits. Under this agreement Paramount purchased outright all of the assets of Fleischer Studios, and agreed to advance money for the production of certain new cartoons."
>
> After the exhaustion of the motion picture market for these cartoons, "there remained * * * [huge sums] which had not been recouped by Paramount. * * * Paramount did not have the means of distribution for television, and consequently entered into several arrangements for the sale of the films in its vault." There still remains an unrecouped balance of almost $800,000 owing to Paramount by reason of the new cartoons.

Petitioner's references to earlier contracts and cartoons are completely irrelevant since, as is pointed out in the opinions in both the instant and the state court actions, the 1941 agreement "explicitly cancelled all prior agreements" and, in consideration for the extinguishment of Fleischer Studios' huge indebtedness, transferred absolutely to Paramount all of its pre-existing cartoons and other assets "without any payment or accounting whatsoever" (222 F. Supp. at 46; 30 Misc. 2d at 21; Ex. A annexed to Compl., Arts. First and Third).

In the jointly tried New York Supreme Court actions of *Fleischer* v. *W. P. I. X., Inc. and Fleischer* v. *N. T. A. Pictures, Inc.* (*supra*, p. 1), petitioner made precisely the same contentions as in its first cause of action here, and

precisely the same defenses were asserted. A final judgment was rendered against plaintiff on each of the three defenses. The court held that the interpretation of the 1941 contract was alone sufficient to dispose of the cases but that, "in the hope of once and for all ending what appears to be interminable litigation" (30 Misc. 2d at 26), it would also pass upon the other two defenses. It held, accordingly, that "plaintiff may [not] sue in his individual capacity" (at 27), and that "[a]ny claims the dissolved corporation may have had * * * are deemed to have abated [under the Florida statutes]" (at 28). The District Court herein ruled, not merely that the New York Court's final judgment constituted *res judicata* or, at the least, collateral estoppel (see Petition, p. 2), but it also upheld, separately and independently, each of the said three grounds for that decision (222 F. Supp. at 41, 49-50).

The second (antitrust) cause of action, although petitioner discusses it first, was not interposed by him until after the issues had been joined and certain proceedings had been conducted with reference to the first cause, and after plaintiff had moved to disqualify Paramount's attorneys. Although the alleged antitrust violations occurred in May 1938, petitioner did not interpose any such cause of action until November 14, 1957—almost 20 years after said alleged occurrence. Accordingly, District Judge Herlands, in his opinion herein, above referred to, stated:

> "The Court is of the clear opinion that the second cause of action of the amended complaint was added in an effort to truss up the previously made motion [for disqualification]." 163 F. Supp. 548, 569 (1958); *appeal dismissed*, 264 F. 2d 515 (2d Cir. 1959); *cert. denied sub nom.* Fleischer v. Benjamin, 359 U. S. 1002.

Argument

To parallel the sequence of the petition, the various, independent grounds supporting the dismissal, on the law, of the second cause of action are set forth in Point I, and the grounds supporting the summary judgment dismissing the first cause of action are set forth in Point II, hereinbelow.

POINT I

The second ("antitrust") cause of action is legally insufficient on no less than seven separate grounds.

In the second cause of action (cutting through the confusion), petitioner charges that Article Twelfth (g) and (h) of the agreement of May 27, 1938, between Fleischer Studios, Inc. and Paramount, reiterated in Article Seventeenth (g) and (h) of their agreement of May 24, 1941—the basic, superseding agreement (*vide supra*)—was somehow in violation of the Sherman Act, as construed "by the decree * * * in *United States of America* v. *Paramount*." On that premise, he alleges that said agreements were "all void, null and ineffective to convey any rights" (32a-36a, 41a *, see also Pet., pp. 11, 14, 24-25).

The contractual provisions objected to merely permitted Paramount to sell and distribute the cartoons "either singly or in groups with other motion pictures," and to cause them "to be exhibited * * * or exploited in theatres * * * owned, controlled, leased or managed by Paramount." The complaint alleges, in conclusory terms, that Paramount, in entering into those provisions, "violated the antitrust laws of the United States of America."

* References to petitioner's appendix in Court of Appeals are indicated by "a" after page number, and references to respondent's appendix in that court, by "b" after page number.

The petition (*e.g.*, p. 14) refers to other, unrelated allegations of this cause of action, which are both irrelevant and invalid. They pertain to alleged transactions between the two corporate parties which preceded their 1941 agreement, and have nothing to do with the antitrust laws (37a-38a). These allegations are utterly irrelevant to this cause of action which, petitioner has at all times emphasized, is based upon "the anti-trust laws" and the "decree" in *United States* v. *Paramount* (*e.g.*, 1a, 60a). Moreover, and in any event, as the Court of Appeals indicated (App., Pet. p. 49), these allegations are subject to precisely the same defenses (hereinafter set forth) as the antitrust allegations.

a. Plaintiff petitioner, as a mere stockholder of the corporation allegedly damaged, may not recover.

In the second cause of action petitioner seeks "a personal recovery for an alleged wrong done to his corporation" (App. A, Pet., p. 49). As the District Court hereinbelow held (180 F. Supp. at 722):

> "The second cause of action does not contain, however, any allegation of facts tending to show any direct injury to plaintiff's commerce as an individual, and it is well established that a shareholder is not entitled to recover, by individual suit, his share of the loss his corporation may have suffered because of a conspiracy to violate the antitrust laws. E.g., Bookout v. Schine Chain Theatres, Inc., 2 Cir., 1958, 253 F. 2d 292."

Other decisions to the same effect include *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956), citing, *inter alia*, *Loeb* v. *Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910) and *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 30 F. Supp. 389 (S. D. N. Y. 1939), *aff'd* 113 F. 2d 114 (2d Cir. 1940); *Gerli* v. *Silk Assn.*, 36 F. 2d 959 (S. D. N. Y. 1929, Thacher, J.).

In order to escape from this settled principle, petitioner (pp. 19-20) has adduced certain wholly incidental provisions of the May 1941 agreement, with respect to consents required of the individual stockholders and other implementation of that purely corporate agreement. Obviously, however, those provisions were not intended to vest any cause of action in the individuals and, indeed, this was expressly so held by the New York Supreme Court in its final judgment. That court squarely repudiated the same contention by plaintiff, and held that the agreement was between Paramount and Fleischer Studios, Incorporated, alone, and that the parties "intended that all of the respective rights and correlative duties set forth therein flow only between Paramount and Fleischer Studios" (30 Misc. 2d at 27).

This intent is clear throughout, from "the preamble" to the end of the agreement, and in addition Article Twenty-Seventh affirmatively precludes any "rights, remedy or claim" in any other "party or person" (Ex. A of Compl.; 30 Misc. 2d at 26-27; 222 F. Supp. at 47). Consequently, as the Court of Appeals here held, petitioner "may not secure a personal recovery", whether "the conclusory allegations of the complaints * * * be * * *, characterized as 'antitrust' or 'accounting' claims" (App. A, Pet., p. 49).

Indeed, the case cited by the District Court, *Bookout* v. *Schine Chain Theatres, Inc.*, 253 F. 2d 292 (2d Cir. 1958), puts petitioner out of court even on the assumption that he sustained a direct loss—which he did not. In that case, Judge Learned Hand, after enunciating the principle above set forth, acknowledged that "the plaintiff alleges that he has an additional claim," based upon the illegal sale of his individual shares, "in pursuance of the original conspiracy" (253 F. 2d at 294). Nevertheless, Judge Hand concluded that even such a claim (which is not made in the instant case) was unavailable, because "the Anti-Trust Acts do not cover such losses" (*ibid.*).

b. Under the Florida corporation dissolution statutes, the cause of action asserted by plaintiff as a trustee or as a receiver abated three years after the corporation's dissolution—i.e., in May 1949.

Petitioner, both in the instant complaint and in his state court complaint (Ex. B, ¶ 1, respondent's motion for summary judgment), cited and requested the court "to take judicial notice" of the Florida statutes providing that the directors of a dissolved corporation "constitute a board of trustees," *viz.*, "§ 608.30 of the Florida Statutes [Title 34]." As both of said complaints expressly allege, a dissolved Florida corporation "shall continue a body corporate for [only] three years after dissolution," and Fleischer Studios, Incorporated, a Florida corporation, "was dissolved by the Proclamation of the Governor of the State of Florida on May 16, 1946" (*ibid.*).

The New York Supreme Court, in the above cited actions by this petitioner against N.T.A. and W.P.I.X., squarely ruled:

> "The above-cited sections [Title 34, §§ 608.29, 608.30] provide that a corporation which has been involuntarily dissolved, as was Fleischer Studios, have a continued life for a period limited to three years after dissolution. Any claims the dissolved corporation may have had, after this three-year period, are deemed to have abated (Walder v. Paramount Publix Corp., 132 F. Supp. 912, 917-919 [U. S. Dist. Ct., So. Dist., N. Y., 1955])." (30 Misc. 2d at 28).

The court accordingly held that any claim asserted by petitioner "in his capacity as trustee" or in any other capacity abated on May 16, 1949, "three years after the corporation's dissolution" (*ibid.*). Here again, both courts below, in addition to holding that decision to be *res judicata*, expressed their full agreement on the merits (App. A, pp. 49-50; 222 F. Supp. at 47-48, 50).

In the leading case of *Walder* v. *Paramount Publix Corp.*, 132 F. Supp. 912 (*supra*), summary judgment was granted against the plaintiffs, who brought suit individually and as trustees of a Florida corporation which had been dissolved more than three years previously. The court held that the continuance of a corporation after dissolution—which, under common law, was "analogous to * * * death"—was limited strictly by the terms of the statutes of the "state of incorporation" (at 917). See, to the same effect, *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631, 634 (1948); *Seaboard Terminals Corp.* v. *Standard Oil Co.*, 35 F. Supp. 566 (S.D.N.Y. 1940). Accordingly, Judge Weinfeld held (132 F. Supp. at 917-18):

> "Once the statutory period has expired the corporation, absent special saving provisions, is defunct for all purposes and the corporation or trustees may not thereafter maintain suit."

Petitioner's persistent invocation of "Chapter 20895 of the Laws of Florida of 1941" (pp. 7-8), in the teeth of the express limitation of said statute to corporations which hold "real property" and the admitted fact that the dissolved corporation had none whatsoever, (*ibid.*; also App. A, p. 50), is incomprehensible. As was held in *Walder* v. *Paramount Publix Corp.*, *supra*, the very fact that the twenty-year term provided in the section cited "is limited to matters involving real property which the corporation holds of record in the State of Florida * * * strongly support[s] the view that the powers granted under [the other statutes] are limited to a lesser period" (132 F. Supp. at 918). That conclusion applies precisely to corporations involuntarily dissolved, under the "Acts of 1935" adduced by petitioner (p. 6), because those very Acts are expressly mentioned in the said real property statute (Pet., p. 8).

Furthermore, petitioner's contrived distinction between voluntary and involuntary dissolutions is contradicted by all of the statutes, and it has been squarely rejected by the United States, Florida and New York courts.

The statute creating the three-year limitation (quoted by petitioner, p. 7, as "Section 45") is clearly of general application, and it expressly provides that it is applicable to "all corporations whether they expire by their own limitations, or are otherwise dissolved." Thus, the Court of Appeals for the Fifth Circuit in *McClung* v. *Hill*, 96 F. 2d 236 (1938) (Petition, pp. 30-31), in affirming a decision by the District Court of Florida, held:

> "Appellants insist that these statutes, though general in terms, do not apply to corporations dissolved as this one was, for nonpayment of corporation taxes. * * *
>
> "We agree with appellees that these statutes, in their general terms, embrace the corporation in question; * * * " (at 238)."

The *McClung* case was cited with approval in the recent Florida decision of *Spector* v. *Hart*, 139 So. 2d 923, 924-26 (D. C. App. Fla. 1962 (Pet., pp. 30-31). In addition, the case was cited in *Walder* v. *Paramount Publix Corp., supra*, at 918, 919, on the precise proposition that "the various sections of the Florida dissolution statute were intended to be read as an integrated whole, and not, as plaintiff contends, a series of unrelated sections" (at 918). It was there held that the sections providing for the functioning of the directors of a dissolved corporation as its trustees "merely prescribe the form and details of the corporation's continued but limited existence" (*ibid.*).

The Florida state courts have also held that the three-year limitation applies to involuntary, as well as voluntary, dissolutions. *State ex rel. Security State Bank of Ft. Ogden* v. *Barker, Circuit Judge*, 141 So. 321.

Petitioner's authorities are wholly inapplicable. Thus, *Gerstel* v. *William Curry's Sons Co.*, 25 So. 2d 560 (Pet., pp. 29-30) merely held that where a corporation had executed a promissory note in favor of plaintiff, and that corporation after dissolution was succeeded by another

corporation which continued its business, acquired all of its assets and assumed all of its liabilities (including, expressly, the said promissory note), the new corporation was liable on the note. In quoting from the opinion, petitioner (p. 30) brashly ends in the middle of a sentence, without so indicating, and omits the court's statement, in the same sentence, that the dissolved corporation "refused to comply and continued in business for more than four years in like manner as if no dissolution had taken place" (25 So. 2d at 562).

Spector v. *Hart* and *McClung* v. *Hill* (Pet., pp. 30-31), as above indicated, support the respondents. Similarly, in *Neville* v. *Leamington Hotel Corp.*, 47 So. 2d 8 (mis-cited as 81, Pet. p. 31), it was held merely that an action might be brought against the dissolved corporation within the three-year period, with an appropriate substitution of the directors as trustees. Contrary to petitioner's contention, the court indicated that a receivership was simply an alternative remedy, and it held that in the case before it there was no necessity for a receiver, since the directors could serve as trustees.

Equally absurd is petitioner's contention that the courts below refused "full faith and credit" to the Florida Circuit Court order of December 19, 1957, "appointing Dave Fleischer the receiver of Fleischer Studios Incorporated" (Pet., pp. 5, 32). In fact, plaintiff did not have himself appointed receiver until after the commencement of this suit by service of his complaint admitting, and after his receipt of an answer alleging, the three-year limitation (see App. Ct. App., p. 54a), and until thirteen and a half years after the dissolution (*id.* at 59a). Manifestly, he could not, at that late date, revivify the defunct corporation or its long extinguished claim. As Judge Palmieri cogently held:

> "There is no warrant for believing that a receiver has any greater length of time within which to commence suit than does a trustee. When a Florida

> corporation is dissolved the Florida courts may either continue the directors as trustees or appoint a receiver. Fla. Stat. § 608.29 (1957), F. S. A.; Neville v. Leamington Hotel Corp., Fla. 1950, 47 So. 2d 8. The result of the exercise of this choice does not affect the length of time within which suits may be brought by or on behalf of the dissolved corporation." (180 F. Supp. at 724-25)

Indeed, in the above-cited New York Court actions by this plaintiff in *Fleischer* v. *W. P. I. X., Inc.* and *Fleischer* v. *N. T. A.*, where plaintiff expressly sued "as receiver" as well as "trustee in dissolution", the court held to precisely the same effect (30 Misc. 2d at 28-29), and its final judgment clearly constitutes a collateral estoppel herein.

That decision applies *a fortiori* since in the instant case plaintiff, who did not contrive his appointment as receiver until after the service of his amended complaint, sought leave to "cure that defect" by filing a supplemental complaint (180 F. Supp. at 725). Judge Palmieri held that plaintiff could not, under those circumstances, file "a supplemental complaint setting forth facts which occurred after the complaint was filed, even if those facts were such as would show that a claim now exists. *Bonner* v. *Elizabeth Arden, Inc.*, 2 Cir., 1949, 177 F. 2d 703, 705" (*ibid.*).

Obviously, the *ex parte* order appointing plaintiff receiver was not denied "full faith and credit", since it could not, nor did it purport to, give plaintiff any greater rights than those permitted under the applicable Florida statutes.

c. The statute of limitations barred this cause of action.

The district court held that this cause of action:

> "* * * was the result of an agreement entered into between certain of the defendants and Fleischer Studios, Inc. in 1941. By that agreement, now immune from attack under the antitrust laws because of the statute of limitations, the defendants, as alleged in the amended complaint, received the right

> to deal with the distribution rights to the cartoons in their discretion. The injury under the antitrust laws, if any, was inflicted when the contract was made. The period of limitation is not extended by the fact that damages from that injury may have continued to accrue. Steiner v. Twentieth Century-Fox Film Corp., 9 Cir., 1956, 232 F. 2d 190, 194-195." (180 F. Supp. 717, at 723)

Among the numerous other authorities to the same effect are *Muskin Shoe Co.* v. *United Shoe Machinery Co.*, 167 F. Supp. 106, 111-12 (D. Md. 1958), citing: *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956); *Miller Motors, Inc.* v. *Ford Motor Co.*, 149 F. Supp. 790, 794 (M. D. N. C. 1957), *aff'd* 252 F. 2d 441 (4th Cir. 1958); *Alexander Milburn Co.* v. *Union Carbon & Carbide Corp.*, 15 F. 2d 678, 680-83 (4th Cir. 1926); *Park-In Theatres* v. *Paramount-Richards Theatres*, 90 F. Supp. 727 (D. Del.), *aff'd per curiam*, 185 F. 2d 407 (3d Cir. 1950), *cert. denied*, 341 U. S. 950.

Since the cause of action accrued on May 24, 1941, the four-year period of limitations under the then applicable statute (15 U. S. C. § 15-b) had expired long before the commencement of this action on October 14, 1957. Nor, as the district court held (at 724) does "the suspension period of • • • 15 U. S. C. A. § 16(b)" help petitioner since, as he concedes (p. 12), it expired in April 1950, one year after the termination of *United States* v. *Paramount*.

The district court's rejection of petitioner's contention of a "continuous wrong" or "conspiracy" (Pet., p. 26; 180 F. Supp. at 724) is supported by all of the authorities. *Mozand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 49 (1st Cir. 1948), *cert. denied*, 336 U. S. 967 (1949); *Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190, 195-96 (9th Cir. 1956); *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (4th Cir. 1934). Precisely in point is *Rutkin* v. *Reinfeld*, 229 F. 2d 248 (2d Cir. 1956), which held:

> "No allegation of conspiracy can thus jump an eight or nine year gap to make a shambles of the statute of limitations and pervert its salutary purpose to set stale claims at rest. Were this not so any bargain which turned out advantageously to the purchaser might be challenged upon a charge of conspiracy made years afterward if any other parties to both sides of the transaction subsequently had further advantageous business dealings with each other" (at 252).

Petitioner's single authority is *Winkler Koch Engineering Co.* v. *Universal Products Co.*, 100 F. Supp. 15 (Pet., p. 26). However, the Court there (at 29) acknowledged the rule as stated here, and drew the clear distinction that in that case there had not been any "completed torts committed against plaintiff" which were time-barred.

The petition reaches another low point when it invokes the Florida statute of limitations providing a period of twenty years in "an action upon a contract • • • founded upon an instrument of writing under seal" (Pet., p. 11). Obviously, this action for alleged antitrust violations, sounding solely in tort, is not so founded; on the contrary, its entire purpose is to avoid and nullify the contract. Furthermore, even the sealed contract referred to expressly provides that it shall be governed by "the laws of the State of New York, irrespective of the place of its execution or of performance" (Ex. A, Compl., ¶ Twenty-Ninth).

d. The complaint actually does not allege any antitrust violation.

Although petitioner has at all times insisted that his second cause of action is based upon a violation of the antitrust laws, the only such violation even speciously alleged is that the 1938 and 1941 agreements permitted Paramount to sell the cartoons "in groups with other motion pictures", that that constituted unlawful "block-booking", and that such practices were thereafter pro-

hibited by the decree in *United States* v. *Paramount* (App., Ct. App., *e.g.*, 33a-36a). However, the contracts do not provide for nor does the complaint allege, the coercive or tied-in sale of groups of pictures, but they provide merely that Paramount has the right to sell more than one picture at the same time. Such right, in the absence of coercion or conditioning, has never been questioned. See *United States* v. *Paramount*, 85 F. Supp. 881, 884, upon which petitioner relies (*e.g.*, pp. 14-15).

e. Even if Paramount had engaged in violations of the antitrust laws, it did not therefore forfeit any of its private contractual rights against Fleischer Studios, nor did Fleischer Studios sustain any damage therefrom.

Petitioner's complaint alleges that because of the unspecified and fantastic antitrust violations by Paramount, its private agreement of May 1941, whereby it received properties from Fleischer Studios, is "void, null and ineffective to convey any rights thereunder" (41a). However, in the leading case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902), at 549, 51, this Court held:

> "As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination * * *."
>
> * * *
>
> "Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it."

To the same effect: *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, especially at 172 (1915); *Bruce's Juices Inc.* v. *American Can Co.*, 330 U. S. 743 (1946) (ironically, quoted by petitioner, p. 24); *A. B. Small Co.*

v. *Lamborn & Co.*, 267 U. S. 248 (1925); *Loughran* v. *Loughran*, 292 U. S. 216 (1933).

In addition, any such antitrust violation as petitioner fantasies would not have damaged Fleischer Studios, which was not an exhibitor or a proper antitrust claimant.

Thirdly, plaintiff's cause of action is predicated upon a conspiracy between defendant and itself or its own "officers, agents and employees" (Pet., p. 17), and such an allegation is legally insufficient. *Sperry Rand Corp.* v. *Nassau Research & Dev. Assoc.*, 152 F. Supp. 91 (E. D. N. Y. 1957), and cases cited at 93.

f. The final judgment of the New York court against petitioner in *Fleischer* v. *W.P.I.X.* and *Fleischer* v. *N.T.A.* effects a collateral estoppel with respect to subpoints a and b hereinabove.

In *Fleischer* v. *W. P. I. X.*, 30 Misc. 2d 17, *appeals dismissed*, 14 App. Div. 2d 846 (1961), *appeals dismissed*, 11 N. Y. 2d 876, *appeals dismissed*, 371 U. S. 16 (1962), as the Court of Appeals here held, "issues central to the case were determined adversely to the plaintiff" (App. A, p. 50). As that Court further held (*ibid.*):

> "Although Paramount was not a party to the New York litigation, both this court and the New York Court of Appeals permit a prior judgment to be invoked defensively as against the unsuccessful party in the prior action, where the issues are the same and have been fully litigated. Zdanok v. The Glidden Co., 327 F. 2d 944 (2nd Cir. 1964); First Congregational Church v. Evangelical & Reformed Church, 305 F. 2d 724 (2nd Cir. 1962); Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 151 N. Y. S. 2d 1 (1956)."

Indeed, there is in fact substantial identity and privity of defendants, including Paramount, by reason of the following facts:

(1) W.P.LX., Inc., the defendant in one of the Supreme Court actions, is also a defendant here, by reason of its acquisition and exploitation of the cartoons in suit (28b); (2) The defendant in the other action, N.T.A. Pictures, Inc., was at all times the sole stockholder of another defendant herein, U. M. & M. TV. Corp., and inasmuch as the latter corporation had previously been dissolved, N.T.A. at all times defended this action in its name (39b); (3) Furthermore, in the Supreme Court action against N. T. A., Paramount was an indemnitor of N. T. A. under an agreement whereby it indemnified N. T. A. "from all damages, losses, etc. in connection with" any claim by plaintiff or Fleischer Studios (Ex. E, Motion Papers for Summary Judgment, referred to in Pet. p. 38); (4) In addition to the relationship of indemnity, there was also privity of property and liability between Paramount and N. T. A., which acquired its new cartoon from Paramount, so that any liability by N. T. A. to petitioner was purely derivative from Paramount's (222 F. Supp. at 44-45, 49).

The New York court decided subpoints a and b hereof squarely against the petitioner. It held, first, that the agreement in suit was solely between the corporations and conferred no rights or standing upon the petitioner individually, despite the incidental clauses adduced by petitioner (30 Misc. 2d at 26-27). It held, secondly, that any cause of action had "abated" under the Florida dissolution statutes, and that petitioner's appointment as a receiver "did not revive a claim which had died * * * in 1949" (at 26-27, 28).

Those determinations constitute a judicial estoppel against petitioner on said two questions (App. A, Pet., p. 50). See also *Hinchey* v. *Sellers*, 7 N. Y. 2d 287 (1959); *Harris* v. *Tarlow*, 33 Misc. 2d 933 (1962); *Ripley* v. *Storer*, 309 N. Y. 506, 517 (1956); *Saphier Agency, Inc.* v. *Green*, 190 F. Supp. 713, 720-21 (S. D. N. Y. 1961); *People* v. *Litt-Chinitz*, 38 Misc. 2d 864, 868-70 (1963); Note, 36 N. Y. U. L. Rev. 1158, 1160-61 (1961).

g. Petitioner was guilty of bad faith in interposing his second cause of action.

Although the alleged antitrust conspiracy was launched as early as May 19, 1938, and damages were allegedly sustained on May 24, 1941, the antitrust cause of action was not asserted until November 14, 1957. It was not even asserted when petitioner first instituted this action in October 1957. As Judge Herlands stated in his opinion denying petitioner's cross-motion to disqualify Paramount's attorneys (163 F. Supp. 548, 569, *appeal dismissed*, 264 F. 2d 515 [2d Cir. 1959], *cert. denied sub nom., Fleischer* v. *Benjamin*, 359 U. S. 1002), *supra*:

> "If plaintiff knew of the alleged conspiracy before he made the instant cross-motion, plaintiff does not explain why he failed to refer to it on November 6, 1957, when he filed the present cross-motion. The first reference to the alleged antitrust conspiracy was made by plaintiff after the present cross-motion was filed."

The court concluded that "[t]his time sequence casts a shadow upon the credibility and good faith of plaintiff" and that the entire cause of action "was added in an effort to truss up" petitioner's unworthy motion to disqualify Paramount's attorneys (*ibid.*).

POINT II

Summary judgment dismissing the first cause of action was properly granted on four separate grounds.

(a) The final judgment of the New York Supreme Court constituted *res judicata*.

As hereinabove indicated (pp. 6-7), the issues under the first cause of action herein were identical with those in *Fleischer* v. *W. P. I. X. Inc. and Fleischer* v. *N. T. A. Pictures, Inc.*, 30 Misc. 2d 17, appeals dismissed, *supra*, pp. 1-2, where final judgment was rendered against this

petitioner. Both complaints "plead a claim of right arising out of the same 1941 contract on the ground that the contract was personal and that Paramount could not lawfully divest itself of its acquired rights by selling the cartoons," and "the defenses • • • [are] identical in substance" (222 F. Supp. at 45).

Consequently, under established New York law, the state court judgment was *res judicata* against petitioner herein, even if there were no identity or privity between the defendants in the state and federal court actions. See, in addition to the cases cited by the Court of Appeals (App., Pet. p. 50). *Gart* v. *Cole*, 263 F. 2d 244, 249 (2d Cir. 1959); *Civoru* v. *National Broadcasting Co.*, 261 F. 2d 716 (2d Cir. 1958, *per curiam*); *Hinchey* v. *Sellers*, 7 N. Y. 2d 287 (1959).

However, as hereinabove shown (p. 20), there was substantial privity and even identity between some of said defendants and priority between the others. Consequently so that even under the old, narrower concept of *res judicata*, which antedated *Israel* v. *Wood Dolson*, 1 N. Y. 2d 116 (1956), this action would be barred: *Hartford Acc. & I. Co. v. First Nat. B. & T. Co.*, 281 N. Y. 162 (1939); *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14, 18-19 (1937); Restatement, Judgments, § 99 (1942).

Petitioner's contention that issues had been "left open for decision in the first case" (p. 37) was demolished by the district court in detail (222 F. Supp. at 43-49), as well as Court of Appeals (App. Pet., p. 50). His principal argument, that the New York court "excluded evidence of the status of the television industry in 1941" (p. 38), actually highlights the identity of the issues in the two actions and indicates that the petitioner is merely seeking a review of the state court's judgment against him.

As demonstrated by the New York court (30 Misc. 2d at 21-24), the 1941 agreement was replete with specific

grants to Paramount of all of the "television," as well as all other, rights and title in the cartoons in suit. Nevertheless, the petitioner there contended, precisely as he does here, that Paramount did not have the right to sell those cartoons for use on television, and it was for that purpose that he sought to introduce the evidence of "the status of the television industry" to which he refers (Pet., pp. 42-43). The New York court properly held that such evidence was inadmissible in view of "[w]hat the contract says" (Pet., p. 44). The courts below held to the same effect, and gave the contract precisely the same interpretation (222 F. Supp. at 46-47).

In petitioner's cited *Ettore* v. *Philco Television Products*, 229 F. Supp. 481 (Pet. p. 42 *et seq.*), the court said (at 487), immediately following the language quoted by petitioner (*ibid.*), that "it is usual today to provide specifically by contract" which rights are conveyed. In the instant contract, the grant of television rights was not only specific, but emphasized by repetition. Actually, the court in the *Ettore* case held that the plaintiff did not have a right under the Civil Rights Law—thereby supporting one of the rulings by the New York court in this petitioner's action against W. P. I. X. It is also significant that this Court denied certiorari in that case.

Petitioner's irrelevant disquisition on "the New York Civil Rights Law" (p. 40 *et seq.*) is also inept. The New York Supreme Court based its decision in favor of W. P. I. X. primarily not upon that statute, but upon the very provisions of the 1941 agreement, which were determinative of its decision against N. T. A. and are determinative here. That court cogently stated:

> "The right to the use of the names was an inextricable part of the absolute ownership rights which Paramount acquired under the May 24, 1941 agreement" (30 Misc. 2d at 31).

(b) (c) and (d) As the courts below also found, "under each of the three grounds underlying that [the New York court's] judgment, even independently of the estoppel effected by it, plaintiff has no claim" (222 F. Supp. at 49-50).

The three other grounds for the granting of summary judgment herein which were precisely the same grounds upon which the New York state court rendered judgment against petitioner after trial—were that: (1) "the agreement of May 24, 1941, about which this suit revolves, vested in Paramount full and complete rights to exploit and sell the cartoons in suit, without plaintiff's consent," (2) "plaintiff has no right or standing to maintain this suit because he was neither a party to the agreement nor a third party beneficiary thereof," and (3) "all claims asserted herein have abated under the applicable Florida law" (222 F. Supp. at 41).

(1) The vesting in Paramount of such "full and complete rights," including the right to sell for "television" purposes, is demonstrated in the New York court's analysis of the pertinent provisions of the agreement (30 Misc. 2d at 21-23), and is also confirmed by Articles Twentieth and Twenty-First (a) and (c) (Ex. A, Motion for Summary Judgment). It is, indeed, not even disputed here.

(2) Petitioner's lack of standing to maintain the first cause of action is even clearer than his lack of standing to maintain the second "antitrust" cause of action, demonstated at page 10, *supra*. The agreement emphatically excludes any rights in any individuals (Ex. A, Art. Twenty-Seventh).

This was also precisely adjudicated, with respect to this very contract, in *Max Fleischer* [plaintiff's brother and a defendant and cross-claimant herein] v. *Paramount Pictures Corp.*, N. Y. L. J., Jan. 24, 1963, p. 13, cols. 1-2 (Sup. Ct., Hofstadter, J.). Similar provisions were unequivocally enforced in *Larkin* v. *Metropolitan Life Ins.*

Co., 28 Misc. 2d 451 (Sup. Ct. 1961); see also *Majestic Mfg. Corp.* v. *L. Riso & Sons Bldg. Co.*, 27 N. Y. S. 2d 845 (Sup. Ct.; not officially reported), *aff'd* 261 App. Div. 1099 (2d Dept. 1941).

(3) The abatement of any corporate claim under the Florida statutes is shown at pages 11-15, *supra*.

The district court properly held that:

> "[S]ince the liability of all defendants arises out of the same issue which was determined, all defendants may claim the benefit of that decision." (160a)

Accordingly, every one of the foregoing defenses applies in favor of each of Paramount's co-defendants-respondents. For each of them, the New York State court judgment is, *res judicata*, and each benefits from plaintiff's lack of standing to sue, as well as the abatement of the action under the applicable Florida statutes (161a).

Conclusion

This petition is singularly devoid of merit, and should be denied. The questions presented involve elementary principles of law and the construction of an unambiguous contract. Moreover, they have been determined against the petitioner, not only once, but repeatedly, by both the state and federal courts, in the course of his "interminable litigation."

Respectfully submitted,

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